

Pension Benefit Guaranty Corporation

80-10

June 9, 1980

REFERENCE:

4021(b)(13) Plans Covered. Professional Service Employer Plans  
4021(c)(2)(A) Plans Covered. Definition of Professional Service Employer  
4021(c)(2)(B) Plans Covered. Definition of Professional Individuals

OPINION:

This is in response to your inquiry whether the above-referenced pension plan (the "Plan") is exempt from the termination insurance provisions of the Employee Retirement Income Security Act of 1974 (the "Act") under § 4021(b)(13) as a professional service employer. For the reasons stated herein, this Office concludes that the Plan is not excluded from Title IV coverage by § 4021(b)(13).

Section 4021(b)(13) of the Act excludes from coverage any plan:

established and maintained by a professional service employer which does not at any time after the date of enactment of this Act have more than 25 active participants in the plan. (emphasis added).

A professional service employer is any entity owned or controlled by professional individuals, as defined in § 4021(c)(2)(B) of the Act, where both the entity and the professional individuals owning and controlling it are engaged in the performance of the same professional service.

Section 4021(c)(2)(B) [\*2] lists some but not all of those individuals who are considered to be "professional individuals." Food brokers, however, are not included in the list. Consequently, our determination of whether such individuals, and others not listed, are "professional individuals" depends on an analysis of the services performed and the expertise required to perform them.

As stated in PBGC Opinion Manual letter 76-106, a professional individual generally is one who provides services which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance of routine mental, manual or physical processes. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and usually would be predominantly intellectual in character.

A food broker who owns and controls a food brokerage business would not appear to fit within the foregoing description of "professional individual." Food brokers buy and sell food, or act as agents for [\*3] others in the buying and selling of food. These activities do not require a prolonged course of specialized intellectual instruction, and are not predominantly intellectual in character. Because food brokers are not "professional individuals" within Act § 4021(c)(2)(B), your firm cannot be a "professional service employer" within Act § 4021(c)(2)(A). Therefore, your firm's plan would not be excluded from coverage under the plan termination insurance provisions of the Act.

This letter constitutes an initial determination of the PBGC which is subject to reconsideration under 29 CFR 2618. A copy of that regulation is enclosed for your information.

If you have any questions please contact \* \* \* of this Office at the above address or at (202) 254-3010.

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General Counsel